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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 63

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 5, 1930
CERTIORARI GRANTED MAY 13, 1930

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In Supreme Court of the District of Columbia

At Law. No. 75165

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC, PLAINTIFF

VS.

HUBERT WORK, AS SECRETARY OF THE INTERIOR, DEFENDANT

Petition for writ of mandamus

Comes now the above-named plaintiff, and, as ground for his petition for mandamus, alleges:

2 1. That the plaintiff is a citizen of the United States and a citizen of and resident of the State of California; that at all times herein mentioned he was upwards of twenty-one years of age and was and still is qualified in all respects to locate and otherwise acquire, own, and patent placer mining claims, situate on the public mineral domain of the United States, pursuant to law in relation thereto; that he brings this suit in his own right and not otherwise.

2. That the said defendant is the duly appointed, qualified, and acting Secretary of the Interior, and temporarily a resident of the District of Columbia, and is sued herein in his official and representative capacity and not otherwise.

3. That on the 1st day of October, 1919, this petitioner and seven other citizens of the United States, each qualified under the law in relation thereto to locate placer mining claims, located the north half of the north half of section twelve in township five south, of range ninety-six west of the sixth principal meridian, in Garfield County, State of Colorado, as the Spad No. 3 placer claim; that at the time of such location the said land was a part of the public lands of the United States subject to appropriation under the mining laws of the United States for the valuable deposits of oil shale therein and not otherwise appropriated or reserved under the law of the United States.

4. That the said Spad No. 3 placer claim was one of a group of six oil-shale placer claims known, respectively, as Spad placer claims Nos. 1 to 6, inclusive, all of which were adjacent to each other and all of which had been located by and were owned by the same persons during the assessment year 1920.

5. That this plaintiff and his colocators of said placer claims performed, whether required by law or not after the passage of the act of February 25, 1920 (41 Stat. 437), the annual labor for the assessment year 1920, ending July 1, 1921, on the claims numbered 4, 5,

and 6, intending that said work was for the entire group of six claims and that the total value of the said annual labor so performed in said assessment year 1920 for said group of claims was more than six hundred dollars. The Secretary of the Interior, in his decision of February 8, 1928, on motion for rehearing, found:

3 "With respect to the contention renewed on rehearing that mere statements of intent that certain work was intended as group development work without regard to evidence as to the character of the work and its relation to the claim as having a tendency to benefit it suffices, it is needful only to say that this contention was given full consideration when the decision was rendered, and it is not considered to be law nor in harmony with the decisions of the department or the courts. The department found that these cuts were not made with any intent that they were to be a part of a general scheme of development of the claims as a group, and sees no reason to disturb that finding. The question of the applicability of the work as common improvement must be determined from the particular facts and circumstances in each case. The supplemental affidavit filed on rehearing to the general effect that a custom existed in the shale regions to perform such work by putting in open cuts on one or more of the claims of a group at an expense equal to $100 for each claim when prorated, is immaterial. No such custom, should it exist, will be permitted to override the requirements of law. Putting this so-called group work out of view as of no avail, attention will be given to the larger questions raised in the brief."

6. That this plaintiff acquired the interest of his colocators in said Spad No. 3 placer claim and during the assessment year 1921, ending July 1, 1922, performed labor and made improvements on said Spad No. 3 placer claim of the value of more than one hundred dollars.

7. That thereafter and during the assessment year 1922, ending July 1, 1923, this petitioner performed labor and made improvements on the said Spad No. 3 placer claim of the value of more than one hundred dollars.

8. That this plaintiff continued to perform labor and to make improvements on the said Spad No. 3 placer claim until the aggregate value of such labor performed and improvements made exceeded the sum of five hundred dollars, and thereupon and on the 25th day of September, 1922, in the United States district land office at Glenwood Springs, Colorado, in which district the said land was then located, applied for patent on the said Spad No. 3 placer claim under the provisions of section 2325, Revised Statutes, and

4 thereafter complied with all requirements of law as to posting and publication of notice and all other requirements for obtaining patent to the said Spad No. 3 placer claim, and on Decem-

ber 16, 1922, paid to the receiver of said land office the purchase price fixed by law for the land covered by the said claim, to wit, the sum of four hundred dollars; and obtained final receiver's receipt therefor, dated December 16, 1922.

9. That at no time after the location of said claim, as above alleged, was there ever any attempted location of said land or any part thereof by any other person; and that at the time of the said application for patent and the said payment there were no claims or rights of any third party to any part of the said land covered by the said placer claim and that no contest, suit or legal action of any kind whatsoever had ever been instituted by the United States or by anyone whomsoever to question the ownership of the said claim by this plaintiff or his colocators or any of them; and that at the time of the said patent application and of the said payment the said land was a part of the public domain of the United States, and was not otherwise appropriated or reserved under the laws of the United States, except that between the time of the location of the said claim and the application for patent thereon, the so-called leasing act, approved February 25, 1920 (41 Stat. 437), had been adopted; but that the said Spad No. 3 placer mining claim was a valid claim existent at the date of the passage of the said act.

10. That after the said payment by the plaintiff for said claim, contest proceedings were instituted in the said Glenwood Springs, Colorado, District Land Office, in which district the said lands covered by the said claim were then situate, against the said claim; that said contest was initiated by the officers of the Department of the Interior and a hearing thereon was had before the register of the said Glenwood Springs District Land Office.

11. That in the said hearing all the charges against said claim were either withdrawn or else dismissed by the said register except a charge founded on the alleged insufficiency of the annual labor for the assessment year 1920.

12. That the record of the proceedings in said hearing was certified to the General Land Office, and the Commissioner of the General Land Office held the claim to be null and void for the alleged insufficiency of the annual labor for the assessment year 1920.

13. That this plaintiff appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and by departmental decision dated October 3, 1927, copy of said decision is hereto attached, marked Exhibit "A," and made a part hereof, the department held that all the charges made against the claim were properly withdrawn or dismissed by the register of the Glenwood Springs land office except the charge concerning the alleged

insufficiency of the annual labor for the assessment year 1920, which last-mentioned charge was found to be sustained.

14. That thereafter this plaintiff applied for a rehearing, which was allowed, and decision on the rehearing was dated February 8, 1928.

15. That in this decision of February 8, 1928, the Secretary of the Interior expressly found:

"The sufficiency of the exposures of oil shale on the claim to constitute a valid discovery is not questioned. The claim appears to have been a valid claim existent on February 25, 1920, the date upon which the act became effective, but it is admitted by claimant that no work or improvements, as required by section 2324, was performed on the claim on or before July 1, 1921, to which date Congress, by the act of December 31, 1920 (41 Stat. 1084), extended the time for doing the annual assessment work for the calendar year 1920. Subsequently the present claimant acquired the title of the other locators of this claim, and annual assessment work was performed for 1921, 1922, and to the time of the institution of this inquiry, which work exceeds in value the sum of $500 required by law to be done as a prerequisite to the grant of a patent." Copy of said decision is attached hereto, marked Exhibit "B," and made a part hereof.

16. That in spite of said finding above set out the Secretary of the Interior held the said patent application for rejection and declared the said claim to be null and void.

17. That thereafter this plaintiff applied to the Secretary of the Interior to exercise his supervisory power and reopen the case, but this was denied by the Secretary of the Interior.

6 18. That the Secretary of the Interior, in and by the said decision of February 8, 1928, affirmatively found as aforesaid that the said claim was a valid claim existent at the date of the passage of the leasing act of February 25, 1920 (41 Stat. 437); that during the assessment years 1921 and 1922 this plaintiff performed the annual labor required by law on the said claim; that the plaintiff continued to perform such annual labor until a total of more than $500 in value of labor had been performed and improvements made upon the claim, whereupon patent application was filed; yet the Secretary of the Interior held the claim for rejection on the theory that the alleged nonperformance of annual labor during the assessment year 1920 was fatal to the claim.

19. That a failure, if any, to perform annual labor during the assessment year 1920 was followed by the performance of annual

labor during the assessment year 1921; that the rights of no third party had attached to the land by location, lease application, or otherwise, and that no action had been then taken by the United States to cancel the claim, no such action having been taken until long after the annual labor for the assessment year 1921 and subsequent years had been performed.

20. Wherefore plaintiff contends that, because of the matters herein alleged, there was nothing left for the Secretary of the Interior to do except the purely ministerial act of issuing patent for the said placer claim; but the Secretary of the Interior had refused to issue the same.

21. That the plaintiff has fully exhausted the procedure of the Department of the Interior in the establishment of his rights and has no further or adequate remedy or procedure therein.

22. That on March 7, 1928, this plaintiff received through the mail from the register of the Denver, Colorado, district land office, in which land district the said lands are now situate, a check for $400.00 as a return of the purchase price of said lands; that this plaintiff immediately caused said check to be tendered back to the said register, who refused to accept the same, on the ground that the case had been fully closed.

23. That the plaintiff holds the said check for $400.00 ready
7 for return and surrender to the register of the land office in which the said lands are situate, and is ready, able, and willing, by the return of said check or otherwise, to pay the purchase price of the said lands.

Wherefore, plaintiff prays that this honorable court will issue an order requiring the defendant to show cause, within such reasonable time as the court may deem proper, why a writ of mandamus should not issue herein; that this court will adjudge that the petitioner is entitled to a patent in fee simple to the said Spad No. 3 placer mining claim and will issue its writ of mandamus, commanding said Secretary of the Interior (defendant herein) to make, execute, and deliver to said plaintiff patent in fee simple to the following described land situate in Garfield County, Colorado, to wit:

. N½ N½ sec. 12, T. 5 S., R. 96 W., of the 6th P. M., and for such other judgment or order as may be proper, and for costs.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER B. NYCE,
Attorneys for Plaintiffs.

[*Duly sworn to by Emil Krushnic; jurat omitted in printing.*]

8 *Exhibit "A" to petition*

Department of the Interior, Washington

A. 10053. Emil L. Krushnic

"N." Glenwood Springs 022364. Placer location held null and void and application for patent therefor rejected. Affirmed

Appeal from the General Land Office

This is an appeal by Emil L. Krushnic from a decision of the Commissioner of the General Land Office of October 5, 1923, adjud'ing the Spad No. 3 oil shale placer claim, covering the N. ½ N. ½ sec. 12, T. 5 S., R. 96 W., 6th P. M., Glenwood Springs Land District, Colorado, null and void, and holding his application 022364 for patent to the same for rejection. On December 15, 1923, adverse proceedings were directed against the location upon three charges. Charges 1 and 2, in effect, allege that the location was fraudulent and made in bad faith, in that Krushnic and Chris C. Dore made the location for their sole benefit by resorting to the device of using the name of six persons in the location of the claim who were without interest therein for the purpose of obtaining more land than could be embraced in a location made by two locators. Charge 3 alleged that the claimants were not, on February 25, 1920, in diligent prosecution of work looking to discovery of mineral. It appears from the record that subsequently the attention of the commissioner was invited to the first report made upon the claim by a field inspector containing a recommendation that a charge be preferred that no annual assessment work for 1920 had been performed upon the claim, whereupon, on February 6, 1925, the charges were amended to include charge 4 which reads: "That for the year 1920, as extended by the act of December 31, 1920 (41 Stat. 1084), to July 1, 1921, neither the applicant nor his predecessors in interest performed any assessment work to the value of at least $100, tending to develop the claims."

9 The applicant denied the charges and upon issues joined a hearing was duly had between the parties, resulting in a record of proceedings of some 900 pages.

This record appears to require the comment that it is unduly burdened with unnecessary [illegible]nts upon the materiality of testimony and with other disc[illegible] and with much testimony so inconsequential or so remote [illegible]elating to the issues that it could

properly have been suppressed by the register under rule 38 of the Practice as obviously irrelevant.

At the close of the Government's case the register sustained the demurrers of the defendants to the sufficiency of the evidence to sustain charges 1, 2, and 3, and overruled his demurrer to charge 4. Charges 1 and 2 were not only not proven but refuted by the testimony of the locators of the claims. Charge 3, in the absence of an averment of lack of discovery of mineral and made where discovery was not questioned, was clearly inapplicable and invalid. Furthermore, no evidence was offered to support it. The Government discharged the initial burden upon it by establishing prima facie that no annual assessment work was performed upon the claim for 1920 within the period required and went further in anticipation of the defense and offered evidence tending to show that the work outside the claim declared to have been done for its benefit as one of a group was not done for that purpose or had a tendency to benefit the claim as one of a group. The action upon the demurrers was correct.

The defendant assails the sufficiency of charge 4 as a valid charge in his brief and oral argument before the department, and contends that the Government is not by the leasing act (act of February 25, 1920) invested with the character of an adverse claimant; that no annual assessment work has been required to maintain claims theretofore initiated and existent at the date of the passage of said act; that the claim does not become ipso facto void upon default in the performance of assessment work, but it would be necessary, to effect such a forfeiture, to assert and establish the same in an independent tribunal. The defendant points to the familiar provision of the mining law that as to land subject to relocation by another upon default of the prior locator in the performance of annual assessment work, the forfeiture is not consummated until some one else enters with the intent to appropriate the property under the mining laws.

From this it is argued that it is th' entry by another that gives notice to a defaulting claimant that he will have to defend against forfeiture, and from this it is contended, in effect, that some physical reentry or affirmative action against the claim must be taken by the Government to terminate a defaulting claimant's rights, and if prior thereto, he resumes his work on the claim, he cures the default. The argument proceeds to state:

Even if the effect of the leasing act could be said to be to invest with the character of public land withdrawn from entry any claims existing at the time of the passage of the act and thereafter abandoned, surely it can not be claimed that the effect of the act is such as to work the forfeiture ipso facto of a claim for which assessment work has been done in any year after the passage of the leasing act

which assessment work might in the opinion of some field inspector of the Government be insufficient to meet the $100.00 requirement of the statute, and, ipso facto, without any overt act on its part whatsoever, to constitute a fictional entry upon the claim by the Government. If such could be the case, the original claimant, never having intended to abandon, would have no notice that there had been a claimed forfeiture as he would in the case of the required actual entry upon the claim by any true adverse claimant. He might continue to do his assessment work in good faith year after year and expend hundreds of dollars upon his claim, as was done in this case. The moment when he would first be apprised that there had been a claimed forfeiture in a prior year based upon the alleged insufficiency of the assessment work done in that year would be at the time of his application for patent.

The contention is not supported by any authority in point nor can the reasoning be accepted as sound.

Charge 4 is founded upon the doctrine that in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals specified in said act and unperfected at the date thereof by a
11 certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the leasing act. Cronberg *v.* Hazlett (51 L. D. 101); Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262). Section 37 of the leasing act was in effect a withdrawal of lands containing oil shale and the other minerals specified therein from location and entry under the general mining laws and for a public purpose. It forbids the perfection of any such location or entry except valid claims existent at the date of its passage and thereafter maintained in compliance with the laws under which initiated, and prescribes that the deposits named therein shall be disposed of only in the manner provided in the act, except claims existing and maintained as above stated. The act had for one of its objects the raising of additional public revenue, evidenced by changing the method of disposition of such deposits from a free grant thereof under valid possessory rights or by the conveyance for a nominal sum of absolute title to the ground claimed, a system of leasing in which rents and royalties are exacted from the lessee. In a recent decision (United States *v.* Lewis G. Norton), decided by the Court of Appeals for the fifth circuit, June 9, 1927, the court said of a withdrawal of a tract under section 2380 for the purpose of survey and sale as town lots: "It is quite apparent that a statute providing for so changing the existing methods of disposing of public lands as to effect an in-

crease of the Government's revenue is one for a public purpose, and the public land reserved pursuant to such a statute is reserved for a public purpose."

Section 37 of the leasing act affords notice to all persons interested in mineral locations containing the minerals mentioned therein of the conditions under which they may maintain their claims and protect the deposits claimed from its operation. There is no warrant for reading into its saving clauses the statutory provision as to resumption of work of the original locator before hostile entry by another. This seems clear when such provision is considered in connection with its context. Section 2324, Revised Statutes, after prescribing the requirement of annual assessment work, provides:

12 "* * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

It is plain that the provision relating to the resumption of work is a restriction imposed upon the right of relocation. It applies only to claims that could be relocated but for the resumption of work. It has no application to lands no longer subject to relocation, or to the operation of the general mining laws, but withdrawn from such operation and subject to other disposition for a public purpose. The defaulting claimant can not restore a lost estate in such lands by resuming annual labor and improvements at a later time.

There is no question as to the jurisdiction of the department to determine whether mining claims for which no patent has been sought are valid or invalid, and so declare. That has been so held in a number of decisions by the department, which have received the sanction of the Supreme Court. (Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 223, 234; Cameron v. United States 252 U. S. 450, 463.)

It follows from what has been said that if the mineral claimants of this location failed to perform the annual work and improvements prescribed by section 2324 upon the claim their rights under the location upon such failure terminated.

The Government's evidence that no work was done or improvements made for the year 1920 within the boundaries of the Spad No. 3 is not controverted by the defendant, but he relies upon the labor and improvements made in that year upon Spad claims 4, 5, and 6, composing part of a group of six contiguous claims named Spads 1 to 6, as expenditure intended to aid in the development, and redounding to the benefit of Spad 3 claim and others of the group.

On this situation the Government is discharged from its original burden of providing the default, and it becomes incumbent upon the defendant to establish that the work done or improve-
13 ments made do as a matter of fact, tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement. Dolles v. Hamburg Consolidated Mines Co. (23 L. D. 267, 274); Copper Clance Lode (29 L. D. 542, 549); Hall v. Kearney (Colo.) (33 Pac. 373); Copper Mountain Mining & Smelting Co. v. Butte Corbin Consolidated Copper & Silver Mining Co. (Mont.) (104 Pac. 540, 542); Lindley on Mines (sec. 631).

The record shows that Chris C. Dere located for himself and associates the Spad group, 1 to 6, in 1919. These claims constitute one contiguous group in the form of a rectangle, covering all of sec. 12 and the S. ½ of sec. 1, each claim a quarter mile wide and a mile long, running in their numerical order from north to south on the slope of a mountain.

Spad 6 is the lowest stratigraphically and topogrophically, and upon its eastern portion, in a V-shaped escarpment with its apex pointing northwordly, the Mahogany series of oil shales, considered the thickest and richest of the Green River formation, outcrop extensively, and are believed by geol'gists to underlie the other claims of the group. Davis Gulch, a tributary of Parachute Creek, traverses the claims in a southeasterly direction. The dip of the shale beds, variously stated to be from 2 to 4 degrees, is in the direction of the drainage. In the fall of 1920 three cuts were made, the first in the Mahogany oil shale in the escarpment facing southerly, about 200 feet west of the east boundary of and upon Spad 6, and about 2,900 feet from the south line of Spad 3 claim; the second in a fair grade of oil shale west of the center and near the north boundary of Spad 5, and on the west side of Davis Gulch, about 1,500 feet from Spad 3; and the third, a hole in broken sandstone, about 750 feet from Spad 3 and on east side of Davis Gulch and the easterly portion of Spad 4, which defendant witnesses state exposes in the left half corner of the hole a bed of oil shale a few inches in thickness. It appears that Spad 5 covers identically the same ground as Hoffman 5 placer, and Spad 6 is similarly covered by Hoffman 2 placer; that the Hoffman are the earlier locations, and the Sapds 5 and 6 were located in ignorance of such prior locations; and that thereafter the Co-
lumbia Oil Shale and Refining Compnay, who are parties in
14 interest in the claim here in controversy, acquired title to the said Hoffman claims and obtained patent to both on the earlier title, without claiming credit for the improvements here in question. The issues presented by the testimony are, first, whether these three

cuts outside the Spad 3 were made for and tend to develop that claim and others of this group, and, second, if the first question is resolved in the affirmative, whether the reasonable value of such cuts collectively is sufficient when prorated among the six claims of the group to satisfy the requirement of $100 worth of work for the Spad 3 claim. If the work is not a part of a general plan having in view the general development of the group, so that the ore may be more readily extracted, and the work has no reasonable adaptation to that end, then, no matter what the value of it is, it cannot be said to be done in the development of the group. Copper Mountain Mining & Smelting Co. v. Butte Corbin Consolidated Copper & Silver Mining Co., supra.

The cut in the Mahog*nay* ledge on Spad 6 is described as an irregular, wedge-shaped hole, admittedly difficult to measure and ascertain the size, having but three faces, and made by blasting the face of the cliff. Inspector Kintz, who measured it, estimated the cubic yardage of rock removed as between 30 and 60, and Mr. Goodale, engineer for the claimants, who likewise measured it, placed it at 88 cubic yards. Inspectors Berry and Stull, witnesses for the Government, from observing it, estimated it 45 and 50 cubic yards, respectively. The hole is placed at the sandstone marker at the top of the Mahogany shales, and Kintz, who is the only witness who testified as to this matter, stated it was about 200 feet to a safe landing place below. The men who dug this cut both testified, Dore for the defendant and C. R. Pratt for the Government. Their testimony can not be reconciled, and the testimony of both betrays many inconsistencies and inaccuracies developed on cross-examination, but they agree that they took advantage of a crack in the rock parallel with the cliff to place a charge of powder, Pratt saying that it took 1½ cans and Dore 6 cans of black powder, and the hole was blown out with a single blast. According to Dere, further work followed, squaring up the hole and mucking, consuming in all, according to Pratt, 5 to 8 days, and, according to Dere, 10 days. As to the purpose of this hole, Dere testified:

"Well, I figured that I was doing the work generally as has been done in that country, making open cuts and tunnels to benefit those claims to develop them at a later date"; that Mr. Pratt and he started opening up a tunnel on Spad 6; that the work consisted "of an open cut and getting ready for a tunnel for the benefit of the Spad claims—the group." * * * "I wanted to open up this rich Mahogany with a tunnel, and I figured the next year that I would keep working for the benefit of these claims, tunnelling it, because it was about on the face of Spad 6 claim, and it was a good place to dump the shale for retorting and operating."

He was asked, "What did you know about tunnels?" He answered, "Well, in 1919, I seen some tunnels built up at the head of east Middle Creek made by Joe Bellis." Question: "Had those been built for groups of claims up there?" Answer: "Yes, sir."

On cross-examination Dere stated that he is not an engineer, and in reply to further question as to his intent stated: "Well, I figuring on driving the tunnel on Spad 6 for the development of all of them because it was the most practical claim to work from, and it was down below the cliff, and I didn't have to move the retort up on top of the hill to work those other claims." He further stated that he had dug over 500 assessment holes, any one of which could have been turned into tunnels by open cuts, but he did not think that there were any (turned into tunnels).

Goodale, the engineer in charge of the assessment work from 1921 on, testified that he first knew of the hole on Spad 6 in 1922; that Dere had talked with him about tunnels, but he had no recollection of Dere mentioning this hole as intended for a tunnel until "lately"; that Dere mentioned the hole to him as one made for the Spad group, but it did not interest him, and he did not go to look at it at the time, because it was a difficult place to get to and his company had title then to the Hoffman location; that it was not represented as an improvement in the application for patent to the Hoffman 2 claim. Pratt's testimony is silent as to whether such was the intent in excavating this hole.

As to the hole on Spad 5, it appears there is a cabin on that
16 claim. Fred Dere's testimony is to the effect that he was told by his brother Chris to go up and dig a certain sized hole 500 feet from this cabin, and to stay up there a couple of weeks; that he dug a hole in black shale about 500 feet from the cabin, 10 by 12 by 18 feet, but did not know in what direction it was from the cabin. He identified a check for $320 issued October 11, 1920, by Chris Dere to their father as one covering full payment for his labor for 14 days at the rate of $6.00 a day, not including board and lodging. It appears from the testimony of Chris Dere that he did not know where this hole was located, and inquired for the information from his brother Fred in the following year in order to point it out to Mr. Goodale. Two engineers for the defendant and one inspector for the Government agree that the size of the hole is 38 cubic yards.

As to the hole on Spad 4, Pratt insists that he spotted the place for this hole and dug it along. Dere states it was dug by them jointly and under his direction; that all the holes were dug for the benefit of the group; that snow was on the ground when he dug this hole, and he could not see when he got into it, but that he thought he was getting into good shale, but it appeared to be a sandstone for-

mation. Pratt stated he worked 8 or 9 days on this hole. Dere states that it took them about 10 days to complete it. Inspectors Kintz and Stull, who measured this hole, state the cubic yardage is 43 and 49.4, respectively. Engineers Savage and Goodale, who also measured it, got results of 53 and 56 cubic yards, respectively.

There is a large volume of opinion evidence in the record upon both sides relative to probable methods of mining shale from these claims, and whether these cuts could or would be used in any general system adopted for mining the shale as a group, and also whether they actually serve any purpose in prospecting or developing the Spad 3 claim. These opinions can not be reconciled. There appears to be a prevailing opinion, however, among those who testified that there is no agreement among engineers as to what mining method will be adopted. Several of the engineers who testified for defendant were of the opinion that the cut on Spad 6 in the Mahogany shale might be used as the portal of a tunnel, and the cut on 4 in the sinking of an air shaft to intersect the tunnel, and the cuts on 5
17 as an air shaft to intersect a crosscut or drift from the tunnel, or that each cut might or could be used as the portal of a tunnel to mine the shales about it.

Engineer Hurlburt, who so testified, admitted that he would not consider an open cut as a tunnel, and would not lay out an air shaft before he started his tunnel, but would wait until the necessity for the same arose, and would want the tunnel to be some distance in; that he would not consider the cut on Spad 4 for an air shaft at the present time; that he meant "at this stage of the oil-shale game he would not formulate any plan to operate oil-shale mines"; that the cuts on 4 and 5 would supply information as to same strata of shale for a considerable distance on adjoining ground. Engineer Savage, who testified to the same effect, on cross-examination stated that he did not know whether he would give any consideration to a 1920 cut as an air shaft until after his tunnel construction was under way. When asked whether he would tunnel northerly from a point close to the east line of the Hoffman 2, replied that one system of laying out a mining proposition is probably just as good as another; that it is entirely a matter of opinion; that he would not consider the location of an air shaft before he started to drive a tunnel, and if he were doing it himself he would probably do it quite differently.

Engineer Carroll was of the opinion that the cuts could be used as level spaces for core drilling, which he thought necessary in development; that he did not know whether the cuts could fit in with a scheme of mining that he would design; that the hole on Spad 6 might be the logical place for a tunnel and it might not be, but he

would not consider the use of this work unsound engineering from "information we have at this time"; that the scheme of development that he had recommended would involve a cost of $27,000 per acre, and the small value of a particular open cut would not have any effect on the utilization of it in such an expenditure. Goodale's testimony was to the effect that it was possible, and not impracticable, to use the cut on Spad 6 as a tunnel and the other cuts as air shafts, but stated that it would be necessary to go down on it to
18 widen it for a portal; that considerations of haulage and drainage and space for dumping and retorting purposes favored the location of a tunnel at this point; that the cuts were valuable in group development work for the reason that that afforded information as to the stratum in which they were dug away from the weathering; that the sandstone cut with the thin seam of shale in one corner, which from tracing the outcrop satisfied him was a solid body, furnished "negative information"; that 15 feet above the cut on Spad 5 there is a bluish shale 3 to 6 inches wide which he traced to Spad 1 and sampled and retorted, obtaining in a 14-inch cut 29 gallons of oil per ton, and that this cut could be used as a portal of a tunnel to drive under shale strata lying above it, which may be mined, though "I am not saying that it will be mined, but it may be by that method"; that he did not think Dere had ever discussed with him any plan for using the cuts as an air shaft. It was his opinion that it is always possible to use any open cut as the portal of a tunnel if placed in such a position as to develop the ground above it, and would benefit the property in which it is put, and he had that intent with every cut he put in, except one on top, where it would have to be a shaft.

The inspectors who testified for the Government admit that it is possible to drive a tunnel from the cut on Spad 6 in such a direction as to intersect shafts driven from the other two cuts, but were of the opinion that it is impracticable. Among the criticisms they made to such a scheme of mining were that a tunnel following a northerly course with Davis Gulch would leave no room for chambers on the west side of it; that the floor of the cut is 14 feet above the bottom of the Mahogany shale, and if run to conform to dip of the strata and provide for drainage would run out and above the Mahogany shale; that if air shafts were needed they could be placed at lower elevation then at the sites of the other cuts, so as to eliminate 150 feet of shafting; that the sandstone cut on Spad 4 furnishes no additional information as to the same strata on Spad 3, as it is naturally exposed for about 200 feet closer to Spad 3; that the same is true of the cuts in shale on Spads 5 and 6, as shale is naturally exposed by erosion on those claims.

19 "Under the decisions of the courts and the Land Department labor or improvements to be credited must actually promote or directly tend to promote the extraction of mineral from the land or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the works thereon or pertaining thereto." Highland Marie and Manilla Lode Mining Claims and cases there cited. (31 L. D. 37, 38.) Under this rule the department has held the value of the shafts upon a placer claim, apparently not sunk to actually extract mineral but to secure data upon which to base later development work, which in that case consisted of a long tunnel finally reaching pay gravel (Kirk et al. v. Clark et al., 17 L. D. 190), and a drill hole placed upon a claim for the purpose of prospecting it and to secure data as a basis for further development (C. K. McCormick et al., 40 L. D. 498, 500) were properly creditable in meeting the expenditure required of $500, as a condition precedent to entry and patent under section 2325, Revised Statutes. And whatever may be credited as labor and improvements to satisfy the requirements as to annual labor under section 2324 may also be credited under section 2325, and the decisions of the courts construing or interpreting such provisions under section 2324 may be resorted to in determining what expenditure in labor and improvements may be credited under section 2325, or vice versa. Zephyr and other Mining Claims. (30 L. D. 510, 513.)

And such labor and improvements may be in fact outside the claims or claims in common, or on only one of the several claims in common, provided the claims for which the credit is sought are contiguous and held in common and intended to aid in the development of the claim or claims in common, as the case may be, and the improvements are of such a character as to redound to the benefit of all. Copper Glance Lode (29 L. D. 549) and cases there cited. But the fact that such work has been done and its relation to the claim for which patent is sought must be clearly shown. (Clarke Quartz Pocket Lode, 27 L. D. 351.) The claimants of such improvement must show that such work was intended at the time as annual assessment work for the particular claims. (Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 111 Pac. 585.) The labor or
20 improvement so sought to be credited must have a direct relation to the claim, or be in reasonable proximity to it. (McGarrity v. Byington, 12 Cal. 426).

In Fredericks v. Klauser (96 Pac. 679, 680) the Supreme Court of Oregon defined the word improvement as used in section 2324 as "such an artificial change of the physical conditions of the earth

in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character." (Underscoring supplied.) Applying these rules to the facts as disclosed in the record, the department is unable to find that these three cuts were part of one general scheme of development for the benefit of the six Spad claims or any number of them or that they are of such a character as to redound to the benefit of all. These facts stand out clearly: there is no tunnel or portal of a tunnel and no air shaft; there is nothing in the character of those cuts, as described by any of the witnesses, that evidences that they were designed for such purpose; there is no evidence even upon the part of Dere that the cuts on Spads 4 and 5 were intended by him as the beginnings of air shafts for his tunnel. Indeed, his testimony leads to the opposite inference, inasmuch as he stated that he started the cut on Spad 4 with the thought that he was getting into good shale, and found he was in sandstone, and the locus of the cut on Spad 5 was selected by a 17-year-old boy, who was instructed to dig a cut of certain dimensions 500 feet from a cabin. It would seem unnecessary to observe that air shafts for such a vast and expensive improvement are not planned in that haphazard way. There is only the evidence of the mining engineers, who testified for the defendant to the effect that the cuts on Spads 4 and 5 might fit into a practicable scheme of attack upon the oil shale by tunneling from the cut on Spad 6, if upon further study of the ground and a determination of the best methods of mining the deposit such a method were adopted. Although it may be true that a shallow assessment hole in a stratum of shale may furnish some information as to the character and value of the stratum disclosed and does furnish definite information as to the nature and condition of the
21 strata away from the effects of weather and information as to local dips, there is no specific evidence in this record pointing out how the cut, practically in barren sandstone on Spad 4, and the cuts on Spad 5 and 6, where the oil shale strata were exposed by erosion, would be of service as information as a basis for future development of Spad 3 or any other claim of the group other than the claim upon which the cut was made. The fact that such an assessment hole might be utilized as a portal for a tunnel or in the construction of an air shaft under some later plan of development is insufficient to credit its value as a group improvement. The fact that claims cover a continuous deposit covering one ore mass does not relieve the claimants of the improvements thereon from the requirement of showing that they will aid in the extraction of the mineral or will tend to promote the development of such claims.

Lawson Butte Consolidated Copper Mine (34 L. D. 655). The cut on Spad 6 does not reveal or suggest in itself any design to drive a tunnel from that point. The only testimony is the naked, uncorroborated assertion of Dere that such was his purpose in digging it, which the appellant contends is sufficient. Even if this statement were accepted as sufficient, and allowing the utmost credit claimed by the defendant as the value thereof, to wit, $287.75, based upon the data as to costs supplied by this witness, the amount is insufficient when distributed pro rata among the six claims that it is alleged it was intended to benefit to satisfy the requirement as to assessment labor on Spad 3.

Counsel for the defendant relies upon the rule that "it is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property or to determine whether one mode of use would be more beneficial than another" (Lindley on Mines, Vol. 2, third ed., section 631). This rule has been followed by the department in controversies as to whether a certain improvement that had been made would aid in the development of a group of claims (Hughes et al. v. Ochsner et al., 27 L. D. 396), or where it is a question of whether some better method could have been pursued than that actually pursued (C. K. McCormick et al., 40 L. D. 498). The answer of the court in Copper Mountain M. & S. Co. v. Butte Corbin Consol. C. & S. M. Co., 22 supra, to the same contention made in that case, seems apposite here. The court said, in deciding that a certain tunnel did not tend to benefit the claims in question:

"Counsel for plaintiff contends that it appears that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the court should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adopting the plan pursued. As an abstract proposition we think counsel states the correct rule. (Menn v. Budlong, 129 Cal. 577, 62 Pac. 120; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600.) Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaption to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded."

See also Dolles v. Hamberg Consolidated Mines Co. (23 L. D. 267, 274).

The conclusions of the department are that the three open cuts, or any one of them, has not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown

that they were made in furtherance or are a part of a general scheme to develop the claims as a group. For these reasons the commissioner's decision is affirmed.

(Signed) E. C. FINNEY,
First Assistant Secretary.

Exhibit "B" to petition

Department of the Interior, Washington

A. 10053. February 8, 1928

Address only the Secretary of the Interior.

Emil L. Krushnic

"N." Glenwood Springs 022364. Motion denied

Motion for rehearing

Emil L. Krushnic has filed a motion for rehearing in the
23 matter of his application, Glenwood Springs 022364, for patent to the Spad No. 3 oil shale placer claim covering the N½ N½ sec. 12, T. 5 S., R. 96 W., 6th P. M., Colorado. By decision dated October 3, 1927, the department affirmed the decision of the Commissioner of the General Land Office rejecting the application and held the claim to be null and void. The grounds for the department's decision were that under the provisions of section 37 of the act of February 25, 1920 (41 Stat. 437), known as the "leasing act," the shale deposits within this claim were subject only to disposition in the form and manner provided by that act and that the claim was not within the saving clause of section 37, which excepts from the operation of the act "valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery"; that to maintain a claim in compliance with the laws under which initiated means, among other things, the performance of $100 worth of annual labor and improvement prescribed by section 2324, Revised Statutes, and failure to fulfill this statutory requirement as to a claim unperfected by a certificate of entry terminates by the force and effect of section 37 all rights of the claimant under the general mining laws; and the shale deposits thereon became subject to disposition only under the leasing act.

The Spad No. 3 claim is one of a group of six claims located in 1919. The sufficiency of the exposures of oil shale on the claim to constitute a valid discovery is not questioned. The claim appears to have been a valid claim existent on February 25, 1920, the date upon which the act became effective, but it is admitted by claimant that no work or improvement as required by section 2324 was performed on the claim on or before July 1, 1921, to which date Congress by the act of December 31, 1920 (41 Stat. 1084), extended the time for doing the annual assessment work for the calendar year 1920. Subsequently the present claimant acquired the title of the other locators of this claim, and annual assessment work was performed for 1921, 1922, and to the time of the institution of this inquiry, which work exceeds in value the sum of $500 required by law to be
24 done as a prerequisite to the grant of a patent. The claimant sought to have accredited as assessment work for 1920 the aggregate value of three holes made in 1920 on other claims of the Spad group as common improvement for the benefit of the claims as a group, which work after due notice and hearing was held not to have any tendency to in any wise develop the claims as a group, nor was it shown that they were made in furtherance or a part of a general scheme to develop the claims as a group.

The motion challenges the correctness of the application of the rules as to group development to the three holes made in 1920, and in addition it is contended that, irrespective of whether or not the work was performed in the year 1920, the department, under rules established in a number of its decisions and decisions of the courts, has no concern with the performance of annual assessment work on oil-shale placer claims; that whether it can enter upon this inquiry or not, by the resumption of work upon the claim prior to any acts of physical reentry or the institution of proceedings of ouster or to determine the validity of the claim, a forfeiture was prevented and the location is therefore a " valid claim " within the meaning of section 37 of the leasing act, and to hold otherwise is an attempt to destroy a vested right; that even upon the assumption that the language in section 37 declares unequivocally that upon failure to do the assessment work, the possessory title to an oil-shale claim would be forfeited to the United States, the United States in its proprietary capacity is now equitably estopped from claiming a forfeiture; that the rule of property prevents an automatic forfeiture.

Able and elaborate arguments in connection with the rehearing have been presented orally before the Secretary and in briefs filed by claimant's counsel and counsel for other oil-shale claimants who were allowed to appear as amicus curiæ. The department fully appreciates the importance of the question in its effect upon the valid-

ity of a large number of oil-shale and other locations made for minerals subject to disposition under the leasing act. It also has lively apprehension of the far-reaching results if the decision assailed is overturned upon the public interest in abridging the operation, or greatly diminishing the possibilities of the operation of the
25 leasing act, which secures to the Government some measure of control over the development and production of such mineral resources named therein for which there is present demand, and which reserves the title in the United States to other minerals for which there is no immediate economic need, and which provides in cases of both present and future utilization a substantial source of public revenue in rents and royalties. In efforts to minimize the effect of sustaining the contention of claimants in this case, it is stated in the brief that but ten per cent of the oil-shale land was covered by locations made prior to the leasing act. The department has no certain and complete data available, but is in receipt of official information to the effect that of the approximately 1,000,000 acres of oil-shale lands in the Green River formation, Colorado, from 600,000 to 750,000 acres are blanketed with oil-shale location notices of record antedating the leasing act and that those cover what is considered the richest and most commercially valuable shale.

With respect to the contention renewed on rehearing that mere statements of intent that certain work was intended as group development work without regard to evidence as to the character of the work and its relation to the claim as having a tendency to benefit it suffices, it is needful only to say that this contention was given fully consideration when the decision was rendered, and it is not considered to be law nor in harmony with the decisions of the department or the courts. The department found that these cuts were not made with any intent that they were to be a part of a general scheme of development of the claims as a group, and sees no reason to disturb that finding. The question of the applicability of the work as common improvement must be determined from the particular facts and circumstances in each case. The supplemental affidavit filed on rehearing to the general effect that a custom existed in the shale regions to perform such work by putting in open cuts on one or more of the claims of a group at an expense equal to $100 for each claim when prorated is immaterial. No such custom, should it exist, will be permitted to override the requirements of law. Putting this so-called group work out of view as of no avail, attention will be given to the larger questions raised in the brief.

26 As stated in the previous decision and admitted in one or more briefs filed, the leasing act is in effect a withdrawal of the mineral lands therein described. It is likewise a repeal of the

mining laws in so far as they relate to such lands, except those lands embraced in claims that are excepted from the operation of the leasing act by section 37 thereof. The claimant is seeking title under the general mining laws to lands containing oil shale. It is incumbent for him to show that his claim falls within the exception mentioned in section 37, and it is the duty of the department as guardian of the public domain charged with the administration and disposal of public lands to inquire whether his claim meets the requirements of that section. The excepting clause in that section declares in plain and specific language that the claim must be maintained after the passage of the act in compliance with the laws under which initiated. Section 2324, Revised Statutes, being one of the laws under which the claim was initiated, declares "that on each claim located after the tenth day of March, eighteen hundred and seventy-two, and until patent has issued therefor, not less than one hundred dollars' worth of labor shall be performed, or improvements made by the tenth of June, eighteen hundred and seventy-four, and each year thereafter." There follows in the same section a provision that "upon failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location."

The provision for the performance of $100 worth of labor or improvement is mandatory. The well-settled construction of these provisions of the section is that the necessity of doing the work is imperative in order to maintain the claim. (Chambers v. Harrington, 111 U. S. 350, 353, and other cases cited in note 231, section 30, U. S. C. A.). It has been repeatedly held that development work is the condition of the miner's continued possession (O'Reilly v. Campbell, 116 U. S. 418, 423; Jennison v. Kirk, 98 U. S. 453; Jackson v. Roby, 109 U. S. 440), which can only be maintained by annual
27 expenditure thereon of the work required by law. As stated in El Paso Brick Co. v. McKnight, 233 U. S. 250, 256, "Locators of mining claims have the exclusive right of possession of the surface so long as they make the improvements or do the annual assessment work required by the Revised Statutes, section 2324." (Underscoring supplied.) Development by working is a condition to continued ownership until patent issues. (Erhardt v. Bearo, 113 U. S. 527, 535.) To keep up and maintain a valid location one hundred dollars' worth of work and labor must be done or improvements made during each year until patent issues therefor. (Gwilliam v. Donnellan, 115 U. S. 45.) Every person who continued in possession

of such property without performing annually the labor that has been specified violates the conditions of the grant from the Government. (Honaker v, Martin (Mont.), 27 Pac. 397, 398.) In view of these well-settled constructions of the mining laws, which Congress may be presumed to have known the leasing act was passed, there would seem to be no doubt that to maintain a claim in compliance with the laws under which initiated necessarily meant the performance of the requirements of annual labor and that there was no other intent or purpose in the use of such words than to protect and preserve only claims where the possessory rights had been maintained. As between the Government and the claimant the test of the validity of the latter's claim is found in the provisions of section 37, and not that part of section 2324, Revised Statutes, which defines his rights with respect to some stranger who seeks to relocate the claim. The language of the court in the Yosemite Valley Case, 15 Wall. 77, 93, with certain interpolation of words to agree with the facts here, sharply brings into view what is believed to be the fallacy in the argument as to the right of resumption of work. The court said:

"The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition (retention) by the settler (mining claimant) of a legal right to the land occupied by him as against the owner, the United States, and the acquisition (retention) by him of a legal right as against other
28 parties to be preferred in its purchase when the United States have determined to sell."

When the original locators failed to maintain the claim by doing the annual assessment work within the period prescribed by law, all their rights against the Government in and to this location upon oil-shale lands were extinguished, and this claimant, who acquired the outstanding interest of the other locators and proceeded thereafter to reenter and perform work on the land that was no longer subject to the general mining laws, was no more than a trespasser, and could neither revive nor initiate any rights to the land thereby. The foregoing view finds strong support in a recent decision of the Circuit Court of Appeals for the 8th Circuit in the case of Hodgson v. Midwest Oil Company, 17 Fed. (2d) 71, where it was held that the failure to do the assessment work for 1921 upon an oil placer claim located in 1887 on lands included in a petroleum withdrawal made in 1909 terminated all possessory rights thereto. The court said (page 77):

"Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate."

Nothing is perceived in the language employed by Belk v. Meagher, 104 U. S. 279, and the many decisions of the courts and departments, relied upon by claimant and amicus curiæ applying the doctrine of that case, which dealt with the possessory rights of rival mining claimants, based upon the construction solely of the general mining laws that conflict with this conclusion. Much emphasis is placed on this passage in the opinion in the Belk v. Meagher case (p. 282):

"For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditures on claims then in existence might be made at any time before Jan. 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators or those claiming under them before a new location was made. Such being the law, it seems to us clear that if the work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as
29 they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that if no work is done before January, 1875, all rights under the original claim are gone, but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued without any work at all until Jan. 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred. The act of 1874 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new. (Underscoring supplied.)

There is no doubt that the doctrine above quoted continues to be the law as to mineral lands that continue to be subject to location and purchase under the general mining law, but it is not the law as to mineral lands affected by the leasing act. Section 37 thereof at one blow destroyed the right of relocation of such minerals and with it fell the right of resumption. It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title that it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither the Government nor an individual can now take advantage of his default. The fair and obvious meaning of section

37 is that if the annual work is not done, all the rights of the claimant are gone. When the law on a particular subject is radically changed by statute, decisions under the old law become of little value as authority. (Lemp v. Hastings, 4 Greene (Ia.), 448.) The courts may properly refuse to follow precedents where the reasons upon which such precedents are based no longer exist. (Jennings v. State, 13 Kan. 80; Brennan v. New York, 1 Hun. 315, 47 How. Prac. 178.)

In the interpretation of the text of the excepting clause in section 37, it is contended in some of the briefs that it was recognized
30 that a claim might be valid though imperfect. Emphasis is placed upon the concluding words—" which claims may be perfected under such laws, including discovery." It is argued that by providing that a discovery might be included in the process of perfecting a claim Congress necessarily indicated that claims having other imperfections are within its meaning. As persuasive of this view, attention is invited to the discussion of this section (then 36 of the Senate bill) in the Senate, reported in vol. 58, part 5, pages 4577–85, of the Congressional Record, which resulted in the addition of the words " including discovery."

In view of the plain requirements of the statute that the claim must be maintained in accordance with the mining laws under which initiated, it is not considered that resort to extrinsic sources is necessary to ascertain its meaning with respect to the requirement of maintenance. Nevertheless, after careful reading of the discussion to which attention is invited, the conclusion is believed unescapable that the addition of the words " including discovery " was to place claims upon which there were bona fide claimants at the date of the passage of the act diligently engaged in prosecution of work looking to discovery and who continued in such work to discovery upon the same footing as those mining claimants similarly engaged on oil and gas-bearing lands within their claims whose rights were preserved from the operation of withdrawals under the Picket Act. (Act of June 10, 1910, 36 Stat. 847.) Long before the passage of the leasing act the courts in their decisions had recognized that a locator in actual possession of his claim and diligently and in good faith engaged in the prosecution of work to discover mineral thereon by license if not by invitation of the Government and who had made large expenditures thereon had a substantial interest in the claim, and that his possession was entitled to protection against those who had no better right. The Picket Act and the leasing act recognized such rights as worthy of protection from withdrawals. There is no warrant for the inference that the leasing act intended to protect the negligent or those who had not manifested their good faith by

doing the annual labor and had done nothing with the intent of actual development. There is nothing in the terms of section
31 37 that warrants the construction that if one particular specified imperfection is excused another imperfection or any number of imperfections may likewise be overlooked. Such a construction is repugnant to the spirit and purpose of the act and would render it practically ineffective and nugatory as to any lands covered by a location which some one claimed.

The decision assailed did not question, and no other case has questioned, the rule laid down in numerous departmental decisions that controversies between rival claimants or adverse claims to the same mining location belonged in and should be settled in the courts. Such controversies involve disputes between citizens to the possessory rights to a given tract of mineral land. The question of assessment work in those cases, as has been frequently announced, goes to the right of possession between contending parties. The Federal Government is interested only in having a particular tract developed and disposing of it in accordance with law. It is immaterial in such cases whether A or B has the better claim, or whether one or the other performs the assessment work and secures patent assuming both qualified. The situation here is entirely different. The leasing act, as stated, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act. It is the duty of the department to scrutinize claims that are asserted to be within the exceptions and ascertain whether the Government or the individual has the better right. The question is one of validity, and under the section 37 maintenance is an essential element of validity. Only controversies between adverse claimants under conflicting mining locations of the same land and which relate solely to the right of possession are committed exclusively to the courts. (Bunker Hill v. Shoshone Min. Co., 33 L. D. 142, 147.) The opinions relied upon in the briefs in cases of Yosemite National Park (25 L. D. 48) and Navajo Indian Reservation (30 L. D. 515), where under the particular wording of those reservations mining claims were excluded and remained excluded irrespective of compliance with the mining laws, do not conflict with
32 the views here expressed. The claimants here seek to invoke a rule to a situation where the reason for the rule does not exist.

The contention that the Federal Government must act the part of an adverse claimant in this and similar cases and be alert and vigilant and take some affirmative action to termin'te the rights of

defaulting claimant before he resumes work, such as by a physical reentry or institution of adverse proceedings in the department or by bringing an ouster suit in the courts, is untenable. Prior to default in assessment work, the claimants had neither the legal nor full equitable title. All they had was a possessory title, i. e., a mere right of possession and enjoyment of the profits without purchase and upon condition which may be defeated at any time by the failure of the party to comply with the condition, viz, to perform or make the annual improvement required by the statute. (Benson Mining Co. v. Alta Mining Co., v. Alta Mining Co., 145 U. S. 428, 430.) The fee was and now is in the United States.

There is no attempt herein to gainsay the doctrine that so long as claimants complied with the condition, by doing the annual work, they had a vested property right protected by constitutional guarantee, but it is a far and unwarranted step to contend from the doctrine that by virtue of the provisions of section 2324 as to resumption of labor, after breach of condition, all rights of the claimant as against the Government were as before, and the estate was preserved, in the face of the provisions of the leasing act withdrawing the lands and providing for a radically different mode of disposition of the *min*erals. In Donnelly v. United States (228 U. S. 243), where the defendant sought to establish a want of Federal jurisdiction over a crime by showing that the crime was committed on a mining claim within the limits of the Hoopa Valley Indian Reservation, the court said: "The prime requisites for the validity of a mining claim are discovery of a valuable mineral deposit, an actual taking possession thereof, and the performance of the requisite amount of development work; where the records does not disclose facts showing the existence of these elements a finding can not be supported that valid rights against the Government existed." (Underscoring supplied.)

33 No plausible ground is made out for applying the doctrine of estoppel against the Government based upon the fact that work was performed on the claim before adverse action was taken by the Land Department. It is manifest the assumed parity or analogy between the status of a mining claim after default in maintenance and a vested estate in fee under a railroad or other grant which is subject to forfeiture for breach of condition subsequent does not exist. The rule is well settled that a legislative act directing the possession and appropriation of lands is equivalent to office found; that any public assertion by legislative act of the ownership of the State, after default of the grantee, such as an act resuming the control of them and appropriating them to particular uses, will be equally effective and operative. (United States v. Repentigny's Heirs, 5

Wall. 211; Schulenberg v. Harriman, 21 Wall. 44; Farnsworth v. Minnesota & Pacific Railroad Company, 92 U. S. 49; McMicken v. United States, 97 U. S. 204, 217, 218.) The land within the claim having become subject to the full force and effect of the withdrawal as between the Government and the claimant, all subsequent efforts by them could not serve to divert the Government of its proprietary title therein. (United States v. McCutchen, 234 Fed. 702, 711.) Irrespective of the true intent and meaning of the statute, the doctrine of the rule of property presents no substantial defense in this case. The cases cited in the briefs on this point did not involve a construction of the law here in question, nor any statute or withdrawal order of like import, nor do they sustain the proposition that the department has disclaimed jurisdiction or declared it to be its policy not to inquire into the doing of annual assessment work and labor where there is a question whether a mining claim was excepted from a withdrawal for a public purpose. As heretofore shown, those cases between rival and conflicting claimants to a particular tract are inapposite. Likewise, the decisions in South Dakota v. Thomas (35 L. D. 171), Wilson v. State of New Mexico (45 L. D. 582), Lizzie Trask (39 L. D. 279), James Morris (47 L. D. 326), and others of similar nature, holding, in effect, that the rights of a bona fide settler on public land, who was overtaken by a withdrawal
34 which saved from its operation only those who had complied with the law under which the settlement was made, were not affected by the statutory requirement that entry should be made in the local office within three months "otherwise his claim shall be forfeited" do not clash with those views. Those cases simply followed the construction of the act in Johnson v. Towsley (13 Wall. 72) to the effect that the filing requirement was a rule to be applied solely between conflicting settlers on the same land.

Contrary to the contentions made in the briefs, there are a number of decisions by the department that declare its right to determine whether valid rights exist in mining claims within the scope and limits of the terms of a withdrawal and make clear the distinction in such cases and cases between rival claimants. In Navajo Indian Reservation, supra, it was said (p. 517):

"Questions concerning the respective rights of adverse claimants to possession of mineral lands, under locations thereof, are to be determined by the courts (Barklage v. Russell, 29 L. D. 401), but for administrative purposes it is proper and necessary, in a case like the one here presented, for this department to determine whether, at the date of said Executive order, a valid right had attached to any tract within the limits described in said order.

The opinion rendered in that case, as stated in E. C. Kinney (44 L. D. 580), that the withdrawal did not attach upon the default of the mineral claimant, was predicated upon the particular language employed in making the reservation. It was plainly indicated that the reservation might have been worded in such a way that the withdrawal would have attached upon default of an existing claim so as to prevent relocation. Other reservations were referred to which were made in such form as to save existing claims so long as the requirements of the law were complied with but which caused the withdrawal to attach and reserve the lands and prevent their disposal in case of default of the claimants who held the land at the time of the reservation.

The effect of a withdrawal under the reclamation act for irrigation works was considered in 32 L. D. 387, and it was there stated that an unperfected mining claim is merely a possessory right which is liable to be divested for failure to perform the necessary yearly labor; also, that the department has jurisdiction to determine whether such right was divested so as to restore the land to the control of the Government. Following the above-stated views, it was held in the Kinney case that "A mining claim as to which the claimant was in default in the performance of annual assessment work at the date of a withdrawal for the construction of irrigation work under the reclamation act does not except the land from the force and effect of the withdrawal." The conclusions in the Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262) and Cronberg et al. v. Hazlett (51 L. D. 101) are in harmony with the Kinney Case and previous decisions there cited, the case of Cronberg et al. v. Hazlett being the first involving the construction of section 37 in its bearing on defaults in the performance of assessment work upon mining claims located upon mineral lands within the purview of the leasing act.

The above review of the authorities sufficiently demonstrates that there has been no change or shift in departmental policy or in its rules of construction and that there was no decision upon the faith of which the claimant would be justified in assuming that his rights under the provisions of the leasing act would be preserved by the performance of annual labor after default. And no rights could arise by virtue of such acts done in defiance or disregard of the provisions of the act, or even done in moral good faith based on a construction placed upon it by reputable legal advisers. The decision assailed follows and applied the construction of the act in the Cronberg Case. The fact that there were adverse claimants under the leasing act in that case and the Chittenden Case is immaterial. The fallacy of this attempted distinction is immediately apparent, be-

cause if the land had not revested in the United States by the force of the act no rights could arise or claim be recognized under it.

Finally, some observations will be made upon the results if the contentions of the claimant and amicus curiæ in this case were adopted. They would lead to the absurd and unwarranted situation that claimants could for years maintain a paper possession of portions of the public domain, not performing a stroke of work or spending a dollar in money. In action and failure to comply
36 with the law would be rewarded and such claimant would be protected to the same extent and in the same manner as another claimant who had in every respect complied with the provisions of the general mining laws and with section 37 of the leasing act. Not only shale lands in the public domain would be subject to these paper claims, but lands specifically withdrawn for governmental use, as naval reserves or otherwise, would be subject to the assertion of these paper claims at any time in the future years, unless and until the Government ran down each paper location recorded in the various county offices in the Western States and instituted a formal proceeding to cancel something which had lapsed and been abandoned through the failure of the claimants to carry out the specific requirements of the law.

When the decision in this case was prepared, the department was fully impressed with its importance on account of its involving principles which will become precedents in cases of similar nature now pending or later arising. It was therefore given a most careful examination, and this petition has had the same attentive consideration. The result is that the department sees no reason to depart from its previous conclusion. The motion is therefore denied.

(Signed) HUBERT WORK, *Secretary.*

In Supreme Court of District of Columbia

Rule to show cause

Filed March 30, 1928

* * * * * * *

Upon consideration of the verified petition filed herein by the plaintiff, it is by the court, this 30th day of March, A. D. 1928, adjudged, ordered, and decreed that the defendant, Hubert Work, Secretary of the Interior, be, and he is hereby, required to show cause before the Supreme Court of the District of Columbia, on the 20th day of April, A. D. 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be issued requiring and commanding him to make, execute and

37 deliver to Emil L. Krushnic, plaintiff herein, a patent in fee simple to the following described land situate in Garfield County, Colorado, to wit:

N½ N½ sec. 12, T. 5 S., R. 96 W., of the 6th P. M.

WENDELL P. STAFFORD,
Justice.

Marshal's return

Served a copy of the within rule on Hubert Work 3/31/28 personally.

EDGAR C. SNYDER,
U. S. Marshal in and for the Dist. of Columbia,
By HAROLD T. SCOTT,
Deputy U. S. Marshal.

In Supreme Court of District of Columbia

Response to rule to show cause

Filed April 12, 1928

* * * * * * *

The defendant Hubert Work, as Secretary of the Interior, responding to the rule to show cause herein, admits the material allegations set forth in the bill of complaint, but, forasmuch, as in the aggregate said allegations furnish no proper grounds for granting the relief prayed, he moves the court to dismiss the bill and discharge the rule, at plaintiff's costs, as well as for the following additional reasons:

1. By statute the Secretary of the Interior is vested with authority and discretion to construe the public land laws of the United States, of which the mining laws are a part; and the bill of complaint discloses that the determination of the questions therein alleged to have been presented to that officer was the result of the exercise of official judgment and discretion, was not the result of arbitrary or capricious action, but, on the other hand, was thoroughly presented by counsel and exhaustively considered and discussed by him in reaching his decision; such action will not be controlled, reviewed, reversed, or modified by any court in a mandamus proceeding.

2. The decision of the Secretary of the Interior herein
38 sought to be controlled by a writ of mandamus is final and conclusive on plaintiff, and this court has no jurisdiction thereof.

3. The bill further discloses that plaintiff has failed to maintain his original right to the placer mining claim involved in that he has omitted to perform the labor at the time provided therefor by law, and thereby has permitted such claim to lapse; that under such

a condition Congress, by the act of February 25, 1920 (41 Stat. 437), appropriated the land to the purposes of said act, and thereby prevented plaintiff from reviving and reinstating said original lapsed claim.

4. That the provisions of the leasing act, without more, operated, at a time when the tract involved was under no valid existing claim in favor of plaintiff or anyone else, except the paramount ownership of the United States, to withdraw said land from the operation of the mining laws under which plaintiff had formerly initiated his claim and to place it entirely and wholly under the provisions of said leasing act.

5. The bill discloses no right in plaintiff to the relief prayed.

HUBERT WORK,
Secretary.

[*Duly sworn to by Hubert Work; jurat omitted in printing.*]

In Supreme Court of District of Columbia

Order discharging rule to show cause and dismissing petition

Filed June 28, 1928

* * * * * * *

39 The above-entitled cause came regularly on for hearing on the response to the rule to show cause why a writ of mandamus should not issue to the defendant Secretary of the Interior herein; and the court, after due examination of the pleadings and after duly considering the argument and briefs of counsel for the respective parties, and being fully advised, on this June 28, 1928, discharges the rule to show cause and dismisses the petition for writ of mandamus, at plaintiff's cost, to be taxed by the clerk as provided by law.

WENDELL P. STAFFORD,
Justice.

In Supreme Court of District of Columbia

Note of appeal

From the foregoing action of the court plaintiff notes an appeal in open court to the Court of Appeals of the District of Columbia and fixes the bond for costs in the sum of $100, with leave to deposit $50 cash with the clerk in lieu thereof.

WENDELL P. STAFFORD,
Justice.

In Supreme Court of District of Columbia

Memorandum re bond

June 28, 1928.—$50 deposited in lieu of undertaking on appeal.

In Supreme Court of District of Columbia

Stipulation re substitution

Filed August 7, 1928

* * * * * * *

It is hereby stipulated and agreed by and between the parties hereto, in view of the resignation of Honorable Hubert Work, as Secretary of the Interior, and the appointment of his successor in office, that the above-entitled cause shall be continued and maintained against the successor in office of said Hubert Work, Honorable Roy O. West, as Secretary of the Interior, in accordance with 43 Stat. L. 941.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER Q. NYCE,
Attorneys for Plaintiff.
E. O. PATTERSON,
Solicitor Int. Dept.
O. H. GRAVES,
Asst. to Solicitor,
Attorneys for Defendant.

In Supreme Court of District of Columbia

Assignment of errors

Filed August 7, 1928

* * * * * * *

The Court erred—

1. In its order of June 28, 1928, dismissing plaintiff's petition for writ of mandamus.
2. In its order of June 28, 1928, discharging rule to show cause.
3. In not holding that plaintiff's petition for writ of mandamus states a cause of action entitling said plaintiff to the relief prayed for in said petition.
4. In not recognizing the vested property right of plaintiff herein.

5. In failing to hold that the act of February 25, 1920 (41 Stat. 437), did not take away from the plaintiff the right of resumption of work after default in the performance of annual labor and prior to entry by some third person or steps taken by the United States to terminate the mining claim of the plaintiff.

6. In not holding that the plaintiff's property is taken without due process of law under the fifth amendment to the Constitution of the United States.

7. In failing to give proper legal effect to section 2324, Revised Statutes of the United States.

41-42 8. In failing to give proper effect to section 37 of the act of February 25, 1920 (41 Stat. 437).

9. In other respects apparent of record.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER Q. NYCE,
Attorneys for Plaintiff.

In Supreme Court of District of Columbia

Designation of record

Filed August 7, 1928

* * * * * * *

The clerk will please include in the transcript of record on appeal the following:

1. Petition for mandamus and exhibits thereto.
2. Rule to show cause.
3. Response to rule to show cause.
4. Order discharging rule to show cause and dismissing petition and appeal.
5. Clerk's memorandum of deposit for costs.
6. Assignment of errors.
7. Stipulation.
8. This designation.

CHAS. S. THOMAS,
CHESTER I. LONG,
LANGDON H. LARWILL,
PETER Q. NYCE,
Attorneys for Plaintiff.

Service of above designation acknowledged this 7th day of August, 1928.

O. H. GRAVES,
Atty. for Defendant.

[Clerk's certificate to foregoing transcript omitted in printing.]

43 [Argument and submission, Dec. 5, 1928, omitted in printing.]

44 In Court of Appeals of the District of Columbia

No. 4823

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC, APPELLANT

vs.

ROY O. WEST, AS SECRETARY OF THE INTERIOR

Appeal from the Supreme Court of the District of Columbia

Before MARTIN, Chief Justice; ROBB and VAN ORSDEL, Associate Justices

Opinion

Filed Jan. 7, 1929

Mr. Justice VAN ORSDEL delivered the opinion of the court:

VAN ORSDEL, Associate Justice:

Appellant, hereafter referred to as plaintiff, filed his petition for a writ of mandamus against the Secretary of the Interior to compel the issuance to him of a patent to certain oil shale mining land in Garfield County, Colorado. On the response to the rule to show cause, the court, on hearing, discharged the rule and dismissed the petition.

From the facts set forth in the petition, and admitted by the response to the rule, it appears that plaintiff and seven associates, on October 1, 1919, located, together with a number of other claims, the mining claim here in question known as Spad No. 3 placer claim, which was at that time subject to appropriation under the mining laws of the United States. An attempt was made by plaintiff and his associates to perform the actual labor required on the claim for the year 1920. The labor performed was on contiguous
45 claims, and not on the claim in question, which led to a dispute as to the sufficiency of the performance of the assessment work for the year 1920. Thereafter plaintiff acquired the interest of his colocators and performed the labor required for the assessment year 1921, and continued to perform annual labor until the improvements on the claim were of a value of more than $500.00, when he applied for a patent on December 16, 1922.

It further appears that at no time after the date of the original location of the claim was any attempt at relocation thereof made by any other person, and no contest has been instituted by anyone to question plaintiff's ownership of the claim. However, after the application for patent was made, contest proceedings were instituted by officers of the Department of the Interior. On hearing, all the charges made by the Government against the claim were either withdrawn or dismissed by the register, except the charge as to the insufficiency of the annual labor for the assessment year 1920. On this ground alone the Commissioner of the General Land Office held the claim to be null and void, and this holding was approved by the Secretary of the Interior.

Plaintiff then filed his petition in the Supreme Court of the District of Columbia for a writ of mandamus, and from the order of the court dismissing the petition this appeal was taken.

It is conceded by counsel for the Secretary that but for the in-
46 tervention of the leasing act of February 25, 1920, 41 Stat. 437, during the time when this claim was subject to relocation, plaintiff, under the mining law in force prior to the passage of the leasing act, would be entitled to his patent.

The pertinent provisions of the mining law applicable to this case are found in sections 2324 and 2325, Rev. Stats. U. S. Section 2324 provides in part as follows:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent had been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year * * *; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides the procedure for obtaining a patent, and among other things, "that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or his grantors."

We come now to consider the effect on plaintiff's rights by reason of the intervention of the leasing act during the period 1920, when, it is asserted, the claim was subject to relocation under the mining law. Section 37 of the act provides as follows:

"That the deposits of coal, phosphate, sodium, oil, oil
47 shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled 'Joint resolution authorizing the Secretary of

the Interior to permit the continuation of coal-mining operations on certain lands in Wyoming,' approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

The Secretary of the Interior, in his opinion refusing to issue plaintiff a patent, recognized the well-established principle under the mining law of 1872 to the effect that a failure to perform the assessment work as provided in the act subjected the claim to relocation, and if it is so located before the original claimant resumes work his rights are lost. But if no relocation is made, and the original claimant resumes work, his rights stand the same as if there had been no failure to comply with the conditions of the act subjecting the claim to relocation.

In his opinion, however, as to the effect of section 37 of the leasing act, he said:

"There is no doubt that the doctrine above quoted continues to be the law as to mineral lands that continue to be subject to location and purchase under the general mining law, but it is not the
48 law as to mineral lands affected by the leasing act. Section 37 thereof at one blow destroyed the right of relocation of such minerals, and with it fell the right of resumption. It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title that it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither the Government nor an individual can now take advantage of his default. The fair and obvious meaning of section 37 is that if the annual work is not done all the rights of the claimant are gone."

We think that the Secretary is in error in his construction of the leasing act. In section 37 of the act, supra, Congress excepted from the provisions of the act valid claims existing at the date of its passage "and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." It will be observed that this provision merely circumscribes the operation of the mining act in respect of certain mineral deposits lying within the public domain and subject to discovery and location under that act. By the leasing act these mineral deposits, including oil shale, are withdrawn from private acquisition, except as to valid existing claims at the date of the passage of the leasing act. There is no apparent intention on the part of Congress, by the provisions of the leasing act, to include within

its terms claims initiated under the mining law, and which
49 had a valid existence at the date of its passage. Inasmuch as it is conceded in this case that but for the passage of the leasing act plaintiff's claim is valid and entitles him to a patent, it must be conceded that its validity, in the absence of any intervening relocator, continued at all times from the date of location until the filing of his application for a patent. We interpret the exception to mean that so long as a person who located a claim prior to the passage of the leasing act maintains and observes the requirements of the mining act, and on complete compliance therewith applies for his patent, he comes within the exception to the leasing act and is not barred thereby. Such a locator is not subjected to any forfeitures that did not apply to the mining act; and the mere fact that oil shale claims were no longer subject to relocation after the passage of the leasing act is of no importance. Until relocation intervened, the claim of the original locator of his lawful successor in interest remained unimpaired. His rights after resumption were restored to exactly the same standing that they had if no default had been made.

The statutory requirement of the mining law of annual expenditure upon an unpatented mining claim never was considered, either by the courts or the Government, as a matter of concern to the Interior Department. Section 55 of the department regulations, adopted after the passage of the mining act, declares that "the annual expenditure of $100.00 in labor or improvements on a mining claim,
50 required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

This rule has been followed in the courts generally; and in the Federal courts it has been held that mere failure to perform the required annual labor does not, in the absence of the intervention of a relocator, work a forfeiture. In Bingham Amalgamated Copper Company vs. Ute Copper Company, 181 Fed. 748, the court said:

"The contention is also made that, because the plaintiff failed to affirmatively show the performance of assessment work for its claim for the year 1908, it must be denied relief. A failure to perform the required annual labor does not in and of itself work a forfeiture. It only permits a relocation. As the Abraham claim was located February 25, 1906, it can not be considered a relocation of the plaintiff's claims based on the failure to perform the annual labor for 1908." To the same effect are North Noonday Mining Company vs. Orient Mining Company, 1 Fed. 522; Thatcher vs. Brown, 190 Fed. 708.

Belk vs. Meagher, 104 U. S. 279, was a suit in ejectment between an original locator of a mining claim and a relocator. In that case the rule is clearly announced that mere failure to do assessment work does not terminate the locator's right of possession, until there has been an interruption by the intervention of a relocator. On this point the court said:

51 "It seems clear to us that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred."

In Forbes vs. Gracey, 94 U. S. 762, it was held that while the title to mineral lands remain in the United States until a patent issues therefor, the ores dug and detached from the lands under a mining claim are free from any lien, claim, or title of the United States. They are the personal property of the miner, and as such subject to State taxation. It was also held that a mining claim is property in the fullest sense of the word, and that the claim of the locator is subject to a lien for State taxes and may be sold for the nonpayment of them, without infringing in any respect the paramount title of the United States in the land. This, it will be observed, is

52 clear authority for the proposition that the Government has no responsibility or interest in the contests between rival claimants, or in the ore when detached from the land.

The rule that mere failure to perform annual assessment work does not constitute in itself a forfeiture has been upheld by the courts of the mining States of the West. In Field vs. Tanner, 32 Colo. 278, the Supreme Court of Colorado said:

"It will be observed that failure to do the annual assessment work does not, ipso facto, work a forfeiture of a load mining claim, but the same merely becomes liable to forfeiture, which may be complete and final when the rights of third persons accrue. If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided. McGinnis et al. vs. Egbert, 8 Colo. 41; Belk vs. Meagher, 104 U. S. 279." To the same effect are Lacey vs. Wood-

ward, 5 N. M. 583; Emerson et al. vs. McWhirter et al., 133 Cal. 1036; Madison et al. vs. Octave Oil Company, 154 Cal. 768; Florence-Rae Copper Company vs. Kimbel, 85 Wash. 162.

It would require a stretch of the imagination to hold that under this existing policy it was intended by Congress that the Government, through its Secretary of the Interior, might assume the functions of a relocator and enforce the forfeiture of the locator and dispossess him of his claim. The Secretary, however, bases his opinion upon the recent case of Hodgson vs. Midwest Oil Company,
53 17 Fed. (2d) 71. That case, we think, has little if any bearing upon the question here in issue. It turned largely upon a question of pleading. It appears that the original locator located the oil claim in question in Carbon County, Wyoming, in 1887, and alleged in his petition for ejectment that he had been in open, notorious, continuous, exclusive, and adverse possession of the claim from the date of discovery, May 2, 1887, down to April 22, 1921; and that more than $500.00 worth of labor had been expended in improvements thereon prior to September 27, 1909, when by an Executive order of the President of the United States all vacant and unappropriated public lands and petroleum deposits in the public domain were withdrawn from location and entry under the mineral public land laws. He further alleged that on May 10, 1910, William G. Henshaw and seven others secretly, fraudulently, clandestinely, and unlawfully entered upon said mining claim and made a location thereof, and that on August 19, 1920, the defendants filed an application for an oil and gas lease on the said land which was thereafter granted, and that on or about April 22, 1921, the defendants wrongfully and unlawfully entered into the actual, exclusive, and adverse possession of said lands, ousting plaintiff's predecessors therefrom, and have since wrongfully and unlawfully held possession of the same.

The question of pleading on which the case turned was the sufficiency of the averment that plaintiff was ousted from possession
54 by the defendants in 1921. The court, after quoting from Lindley On Mines, 3 (Ed.) section 634, to the effect that a locator can not be deprived of his inchoate rights by the tortuous acts of others, said:

"Now in the instant case there is no plea of any threat of violence or physical opposition whatever. There is no allegation in the petition that the plaintiff or his predecessors, or any of them, ever offered or attempted to do assessment work during the period named (the year 1921). The formal plea of entry and actual, exclusive, and adverse possession of a quarter section of land constituting a placer mining claim located after discovery would not seem to be

equivalent to an allegation of such hostile acts and declarations as to satisfy a man of ordinary prudence that it would be unsafe to begin work."

The court accordingly held that in the absence of any showing of assessment work done for the year 1921 all possessory rights of the plaintiff terminated. In reaching this conclusion, the court said:

"It is clear that such original locator and his assigns were required as a condition subsequent to do the so-called 'assessment work' periodically, and upon failure so to do during any interval fixed by law all possessory rights terminated. Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate. * * * It is well settled that a failure to do the work or have an adequate legal excuse automatically terminates the locator's right of possession."

55 These declarations seem to be in conflict with the settled mining law of more than fifty years. We are unable to find an authority, either judicial or departmental or of a text writer, where it has been held that a relocation of the claim is essential before resumption of work by a delinquent locator. "Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture. It does not restore a lost estate." (2 Lindley, Mines (2 Ed.) sec. 651.) Quoted with approval in Knutsen vs. Fredlund (56 Wash. 634; 106 Pac. 202). The locator neither loses his title in his claim nor automatically terminates his right of possession by mere failure to do his assessment work within the statutory period. These rights can only be affected by the relocation of the claim by an adverse party.

It will also be observed that the opinion was not grounded upon the effect of the intervention of the leasing act further than to hold that by the failure of the plaintiff to perform his assessment work in the year 1921 his rights were lost and the claim became subject to disposition under the existing law which at that date was the leasing act. It involved no construction of the leasing act to the effect that the Secretary of the Interior may assume the status of a relocator or that the exception in the leasing act applied to a case of this sort.

56 The fundamental error in the opinion, as we have pointed out, was in holding that failure to do assessment work automatically terminates a locator's rights. It was this misinterpretation of the law which led the department into error.

We construe the exception in the leasing act as intended to preserve all the rights of the locator of an existing claim at the time of its passage. It is urged, however, by counsel for the Secretary that if the leasing act only prohibits the relocation by the third party of an existing mining claim the original locator may defer his assess-

ment work indefinitely, or at least so long as he may evade the charge of abandonment. It is difficult to conceive just how the disqualification of the relocator can affect rights accorded the locator by the statute. The locator, by virtue of his location and development of the mine, acquires a valuable property right that may never develop into a patent.

In the Forbes case these claims are described as "property in the miner, and property of great value. * * * They are property in the fullest sense of the word, and their ownership, transfer, and use are covered by well-defined code or codes of law, and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged, and inherited without infringing the title of the United States."

Neither is this a matter of serious concern to the Government, since these rights were conferred in aid of a policy to insure the
57 development of the mining industry. No intention was displayed by Congress of returning any revenues to the Government from the minerals extracted either before or after patent of the lands. The only possible benefit that accrued to the United States was through the sale of the land for a nominal consideration. It, therefore, was a matter of little concern where the paramount title to the land remained. In either instance the Government was neither a gainer nor a loser. Indeed, by the failure of the locator to purchase, the Government retained title in the land and stood to be a gainer through failure of the locator to protect his rights.

A part of the property right vested in the locator was to resume delinquent assessment work without penalty for his delinquency, and until this right had been foreclosed by the relocation of the mine by a third party it remained a valuable incident of the grant. It logically follows that if Congress in the leasing act had intended to deprive a prior locator of this valuable privilege it would have given expression to that intent in clear and unmistakable language. Not only is the act silent in this particular but there is nothing in the language of the exception on which to hang such a judicial inference. It clearly excepts existing claims that continue to be maintained in conformity with the mining law under which the locator's right had its inception. There is clearly no intent manifested of subjecting this valuable privilege to confiscation by operation of departmental law.

58 We come now to the usual objection presented by the department—namely, the jurisdiction of the court to compel the Secretary, by writ of mandamus, to issue a patent. In this case the court is not invading the exclusive jurisdiction of the Secretary to determine discretionary questions of fact, nor his interpretation

of the meaning of a law upon which the exercise of his discretion depends. In the present case, with the facts conceded, nothing remains to be done by the Secretary but the performance of the mere ministerial act of issuing a patent; and if, as in the present case, the Secretary misinterprets his statutory duties in conformity with the facts, it is well within the power of the court to place its interpretation upon the law and direct the Secretary to act in accordance therewith. Perhaps the power of the court in cases of this character, to control the acts of an executive officer by mandamus, is best expressed in Roberts vs. United States, 176 U. S. 221, where the court, speaking through Mr. Justice Peckham, said:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and
59 in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, construction of its language by the officer. Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties whenever they should plead that the duty required of them arose upon the construction of a statute no matter how plain its language nor how plainly they violated their duty in refusing to perform the act required."

Coming to the more concrete application of the foregoing rule to the present case the court, in Ballinger vs. United States ex rel. Frost, 216 U. S. 240, sustaining an application for a writ of mandamus to compel the Secretary of the Interior to deliver a patent to certain Indian lands, quoted from leading decisions as follows:
60 "The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty." Barney vs. Dolph, 97 U. S. 652, 656.

"Where the right to a patent has once become vested in the purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty." Simmons vs. Wagner, 101 U. S. 260, 261.

"No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus." United States vs. Schurz, 102 U. S. 378, 403. To the same effect are Lane vs. Hoglund, 244 U. S. 174; Work vs. United States, ex rel. McAlester-Edwards Company, 262 U. S. 200.

In the present case it is conceded that but for the intervention of the Leasing Act appellant would be entitled, under the law, to his patent. In this situation clearly nothing remains for the Secretary but to comply with the law and issue the patent; and this may be compelled by a writ of mandamus. "The rule applicable in such a situation is that 'a person who complies with all the requisites
61 necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof.'" Payne vs. Central Pacific Railway Company, 255 U. S. 228, 237.

The judgment is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

[File indorsement omitted.]

62 In Court of Appeals of District of Columbia

UNITED STATES ON RELATION OF EMIL L. Krushnic, appellant vs. ROY O. WEST, AS SECRETARY OF THE Interior	No. 4823

January term 1929

Judgment

January 7, 1929

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and ad-

judged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

Per Mr. Justice Van Orsdel.

63 In Court of Appeals of the District of Columbia

[Title omitted.]

Designation of record

Filed February 27, 1929

The clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the court.
4. Judgment or decree.
5. This designation.
6. Clerk's certificate.

O. H. Graves,
Assistant to the Solicitor,
Attorney for appellee.

A copy of the foregoing acknowledged this 25th day of February, 1929.

Chas. S. Thomas,
Chester I. Long,
Langdon H. Larwell,
Pete Q. Nyce,
Attorney for Appellant.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed May 13, 1929

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered

that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:]

File No. 34122. District of Columbia, Court of Appeals. Term No. 813. Ray Lyman Wilbur, as Secretary of the Interior, petitioner, vs. United States on relation of Emil L. Krushnic. Petition for writ of certiorari and exhibit thereto. Filed April 5th, 1929. File No. 34122.

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